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[APPELLATE CRIMINAL JURISDICTION]

McELWAINE, C.J.

ONG HOCK AND ANOTHER vs. REX.

(SINGAPORE MAGISTRATE'S APPEAL No. 33 of 1939)

Criminal Law — Evidence — Confession — admissibility.

A statement made by an accused to a Revenue Officer in connection with an alleged offence under Section 11 (1) of the Chandu Revenue Ordinance is admissible in evidence when the accused is charged under that section even though the statement is obtained as a result of cross-examination by the Revenue Officer; at any rate unless the cross-examination was a bullying and badgering cross-examination tending to intimidate or confuse the person making the statement.

Rex v. Lim Ah Seng (1931) S.S.L.R. 178 and
Rex v. Santokh Singh (1933) S.S.L.R. 147; 2 M.L.J. 178, commented on.

MAGISTRATE'S CRIMINAL APPEAL.

B. H. Chia for 1st Appellant.

2nd Appellant in person.

C. H. Butterfield, Crown Counsel, for the Crown.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

McElwaine, C.J.—The appellants were convicted on a charge that they on or about 25th February, 1939, at Singapore did an act preparatory to the importation of chandu, to wit, did leave Singapore in motor sampan No. 1274 taking with them materials and equipment for signalling preparatory to proceeding to a point near Pulau Pisang and there recovering the said chandu from the sea and importing it into Singapore and thereby committing an offence under section 11 (1) of the Chandu Revenue Ordinance.

At the trial statements made by the appellants to Mr. Capel, an officer of customs, were put in evidence and the main ground of appeal was that these statements were not made voluntarily and should have been excluded.

On the morning of the 25th February Mr. Capel was on patrol with revenue officers in the Customs launch "Rosemary II".

Mr. Capel noticed a Norwegian vessel, the M.V. "Hai Heng" proceeding North from Singapore. He also noticed a motor sampan which the "Hai Heng" had passed. The sampan was proceeding in the direction of Singapore. Mr. Capel gave chase to this sampan in which were the appellants and a third man and there is no doubt that this sampan had at the time on board a considerable quantity of Red Lion chandu. The three men were searched and detained and various exhibits were found.

The appellants, therefore, before making their statements to Mr. Capel knew that Mr. Capel had a considerable amount of first hand information about them, a circumstance which might induce them to tell the truth.

It has been assumed throughout this case that the sampan when seized by the Revenue authorities was outside the territorial waters of the Colony and that under these circumstances the possession of the chandu was not possession within the limits of the Colony and was not an offence under the Ordinance. The prosecution therefore sought to prove an act done in the Colony preparatory to the introduction of the chandu.

Mr. Capel swore that no threat, inducement or promise was made before the statements were recorded and that he did not tell the appellants that the statements could be used in evidence.

The appellants were not handed into police custody until after the statements had been recorded. Section 26 of the Evidence Ordinance therefore does not apply.

In the course of his evidence Mr. Capel said "some of what I recorded is the answer of questions put by me. The statements were obtained by questioning accused as to what we had seen. We do not give cautions before recording statements. In recording statements I first asked details of name and address etc. I then put a few questions as to the case, e.g., 'what were you doing at Pulau Pisang?' 'When did you leave Singapore?' I put further questions as necessary to extract their stories and get their explanations of any matters they omitted to explain. If I get answers I do not believe to be true I record them nevertheless. I suggest to the person making the statement what I believe to be true and again record his answer. I did not exactly suggest answers by my questions. For example, I asked No. 1 the question 'Where were you going when our launch chased you.' I received no proper reply. Then I asked 'weren't you proceeding to Singapore when our launch chased you?' That is the sort of question I had in mind when I said in my previous evidence 'I suggest to the person making the statement what I believe to be true.' I also asked No. 1 what he

was doing with the knife—thereby assuming that he had a knife. I do not think I asked any other leading questions of any of the accused but I cannot be certain".

Mr. Capel's words "thereby assuming that he had a knife" might be taken as shewing that the question "what was No. 1 doing with a knife" was a kind of shot in the dark. It clearly was not, because Mr. Capel himself had seen No. 1 with a knife in hand in the sampan.

At the trial the defence attempted to exclude the statements by trying to prove that violence had been offered to the accused to force them to confess. This evidence was entirely rejected and forms no part of the appeal. The appellants gave evidence on oath on this issue and on this issue alone. Their cross-examination was also confined to this issue, no attempt was made to cross-examine with a view to establishing the charge.

After hearing argument based on the evidence of assault and on the allegation that the statements were obtained by cross-examination, the learned District Judge admitted the statements.

The Crown case having closed the defence called no evidence.

Mr. Chia argued that the statements were inadmissible because they had been obtained by cross-examination, and because no caution had been given.

In taking a statement it may be very difficult to say what questions are cross-examination and what are not. But I think that a question the answer to which is likely to embarrass or at any rate a question seeking an incriminating admission or an admission that will form a necessary link in the Crown case is cross-examination. Some of the questions Mr. Capel asked were in the nature of cross-examination.

If the point were free from authority I should have no hesitation in holding that the statements were admissible, the District Judge having disbelieved the evidence that physical violence was used to compel the appellants to make statements.

The statements have been treated on this appeal as confessions and I shall assume that they amount to confessions.

The relevant sections of the Evidence Ordinance are:

"24. A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.

28. If such a confession as is referred to in section 24 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the Court, been fully removed, it is relevant.

29. If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession and that evidence of it might be given against him."

It is clear therefore a confession is only inadmissible if it appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused proceeding from a person in authority, and likely to make the accused suppose he would gain an advantage or avoid an evil of a temporal nature in reference to the proceeding against him.

The inducement, threat or promise must have reference to the charge and the proceedings. There may be many threats and inducements such as references to rewards or retribution in another life which do not fall within the category of inducements, threats or promises which make a confession inadmissible.

What the Court tries to find out is truth. Before it takes a confession into consideration it must be satisfied that that confession is likely to be true. If there is evidence of inducements, threats or promises, the accused in his confession may have accused himself

falsely so the Court rejects the confession as of no probative value.

Even Portia recognized this—

"I fear you speak upon the rack,
Where men enforced do speak anything".

But evidence discovered in consequence of an improperly extorted confession may be proved though the confession itself cannot be proved. *Rex v. Mong Pahn* 10 S.S.L.R. 96. "Torture" said Bacon, "is used for discovering, and not for evidence" meaning for the discovery of new facts, not for evidence of the confession so obtained.

Section 29 enacts that a confession otherwise relevant does not become irrelevant—in other words does not cease to be voluntary, though induced by deception, or obtained by asking questions which he need not have answered, *whatever may have been the form of those questions,* or because he was not warned that he was not bound to confess. The reason is that the acts or omissions mentioned in the section have no tendency to make a person accuse himself falsely.

Of course, interrogation might conceivably be conducted by methods recognized in some countries as "third degree" which are nothing short of torture in which case the confession would be excluded by section 24.

Mr. Chia argued that notwithstanding section 29 a confession obtained by ordinary cross-examination ceases to be a voluntary confession and is inadmissible. He cited two cases each decided by a Court of three Judges in the Colony on a point reserved by Judges at Assizes.

In *Rex v. Lim Ah Seng* (1931) S.S.L.R. 178, 1 M.L.J. 12 Stevens J. had admitted a confession made in answer to questions. The Court enunciated what I think was a novel doctrine that a confession must not only be voluntary but also volunteered.

I think it plain from the judgment of Sproule Ag. C.J. that he rejected the confession not because it was not voluntary but because it was not volunteered. "The prisoner answered voluntarily and the magistrate thought that enough. He asked most improper questions as to the nature of the weapons used and the intention of the prisoner, and so on".

Thorne J. said "He must be satisfied that the act of the accused is entirely of his own volition, in addition of course to satisfying himself that no inducement, promise or threat has been made to the accused person. Having satisfied himself with this the Magistrate should then record any statement which the accused person volunteers, and should refrain from asking further questions of the accused other than such as may be necessary to explain any statement he makes, or to ensure that the Magistrate correctly understands what the accused has said".

And Terrell J. "There can be no doubt on the evidence that there was no threat, inducement or promise of any kind. We also have the sworn evidence of the learned Magistrate that the accused's answers to the Magistrate's questions were made voluntarily. In my view there is an essential distinction between a person being willing to make a statement and being merely willing to answer questions put to him in cross-examination". And again "In the present case the learned Magistrate should have been satisfied that the accused did not volunteer to make a statement at all and the subsequent cross-examination should never have arisen".

The Court having introduced this test of whether evidence was volunteered decided that answering questions on cross-examination is not volunteering evidence. The Court did not say that cross-examination rendered the statement an involuntary one. Then came the case of *Rex v. Santokh Singh* (1933) S.S.L.R. 147, 2 M.L.J. 178 in which Mills J. referred the question of admissibility of a confession to a full Court composed of Sir William Murison C.J., Burton J. and Whitley J. The Court disapproved the decision in *Lim Ah Seng's case* that a confession must be not only voluntary but also volunteered. "It is" said Sir William Murison "contrary to the case which I have cited (*Barindra Kumas Ghose v. Emperor* I.L.R. 37 Cal. 498 and *The King v. Best* (1909) 1 K.B. 692) and to the express provisions of section 29 of the Evidence Ordinance".

I think this statement of Sir W. Murison unquestionably right.

In the course of his judgment Sir William Murison said "The real point as Carnduff J. said, is that the only thing abhorrent is pressure or inducement. Cross-examination is a form of pressure and is equally abhorrent," and again "The third proposition laid down by the Appeal Court in *Rex v. Lim Ah Seng* was that as (according to the opinion of the Court) questions had been asked by way of cross-examination they were improper and the statement was inadmissible. I am in accord with this ruling because cross-examination is a form of threat or inducement".

In *Lim Ah Seng's case* cross-examination was not held to be an inducement or threat: it was held to negative the novel test that a confession must be volunteered as well as being voluntary and this new test Sir William Murison and the other members of the Court rejected.

Burton J. says nothing about cross-examination being a form of threat or inducement. He, however, quotes Sproule J's description of the questions asked in *Lim Ah Seng's case* as "unfriendly and improper" and he could find little in the questions recorded in the report to justify these epithets. Whitley J. is equally silent on the question of cross-examination being a form of threat or inducement.

"The law" he says "is now well settled that in order that a confession should be invalidated, there must be an inducement operating to influence the mind of the accused either by hope of escape or through fear of punishment connected with the charge. Such inducement must relate to the charge and reasonably imply that the position of the accused with reference to it will be rendered better or worse according as he does or does not confess. If the confession is obtained by any other influence it will not be invalidated". I pause to observe that this experienced Judge cannot have intended to say that a confession obtained by torture or threat of torture or beating would not be invalidated.

Having referred to *Rex v. Spilsbury* 7 Car. & P. 187 Whitley J. proceeds "There are a number of English cases which established that a confession is not invalidated by reason of its having been obtained by questions and answer, but in view of the words of section 29 'Whatever may have been the form of those questions' there is no need to consider them in detail".

There is nothing in *Lim Ah Seng's case* or in the Judgments of Burton J. or Whitley J. to support the view of Sir William Murison C.J. that cross-examination is a form of threat or inducement and the words of section 29: "Whatever may have been the form of those questions" appear to me to negative the idea.

If making a man drunk in order to induce him to confess does not exclude the confession *(Spilsbury's case—supra)* if this is not a threat or inducement, I fail to see how the asking of a few questions even if they may amount to cross-examination can constitute either a threat or an inducement.

I have already pointed out that the majority of the Court in *Lim Ah Seng's case* did not decide that cross-examination is a threat or inducement and I can find no support for Sir William Murison's proposition. Unless Sir William Murison's remarks are confined to a bullying, badgering cross-examination tending to intimidate or confuse I am unable to accept them. The persons making the statements were perfectly free to refuse to answer any question. These statements are not like statements made under section 24 of the Women & Girls Protection Ordinance where the interrogee is bound to answer truly under penalty any questions asked him.

I see no indication that Mr. Capel asked the appellants any questions which amounted in any way to an inducement, threat or promise. Answers given in cross-examination may be, as Coleridge J. said of drunkenness in *Spilsbury's case,* "a matter of observation for me upon the weight which ought to attach to this statement when it is considered by the jury" but this is a very different thing to saying that the questions amount to a form of threat or inducement rendering the statement inadmissable.

In my opinion the District Judge was right in allowing the statements to be put in evidence. They were made to a person who was not a police officer by persons who were not in police custody at the time they made the statements.

But I agree with the learned District Judge that even if the statements had been excluded there is ample evidence that the first appellant did in Singapore an act preparatory to the importation of chandu.

The sampan is licensed in Singapore under section 441 of Cap. 150. The sampan was transferred to Ong Hock on the 24th February, 1939, both the transferor and the transferee attending the Registry of Shipping that day for that purpose. It must therefore have left Singapore on the 24th or early on the 25th. When caught it had a considerable quantity of chandu on board. A third man, who has not appealed, had what appeared to be a secret signalling code. There was signalling apparatus on board. When it was seized it was making in the direction of Singapore. From this evidence (in the absence of any contradiction or explanation) the inference is irresistible that the appellants left Singapore in this sampan with the intention of picking up chandu at sea and bringing it into Singapore.

The appellants neither gave nor called evidence in answer to the charge. There was nothing in the

evidence of the Crown witnesses that tended to rebut the charge or to afford a defence.

The only defence indicated is in the impugned statements. As these are in evidence they can be considered for what they are worth.

The first appellant is the owner of the sampan. He said that the third accused (who has not appealed) hired him to go to Kerimon Island and for this work promised him $30. He said that he did not know the nature of the work until he arrived at Kerimon. The learned District Judge considered this suggestion and rejected it.

I am not surprised. On his own statement the first appellant did not ascertain the purpose of this trip for which he was to be paid $30. I have no doubt he knew the length of time for which his sampan would be required. It was for less than a day and $30 seems a high price for so short a charter. His conduct in allowing chandu to be taken on board and throwing it overboard when the revenue officers came up lends no support to original innocence. The District Judge was entitled to disbelieve the first appellant's professions of ignorance.

In his statement the second appellant said he was employed by the first appellant at $18 per month to drive the motor sampan. This is probably correct as it is confirmed by the statement of the first appellant and as this man was seen by Mr. Capel at the stern driving the motor. He said he was told by the first appellant who was accompanied by the third man to proceed to an island. Later he saw the Hai Heng and signals from the third man in the sampan and packages lifted from the sea.

This statement indicates that the second appellant did not know what he left Singapore for but the District Judge rejected the suggestion.

This man was a servant and as such might not have known the purpose of the orders he was given by the first appellant. There is nothing in the evidence to indicate that this man handled any of the chandu or took part in throwing it over board or otherwise behaved in a suspicious manner.

I think there is just sufficient doubt as to whether this servant had sufficient knowledge of the plans and devices of his employer to constitute him guilty of doing anything at Singapore which he knew to be preparatory to the importation of chandu.

As I think the offence charged is sufficiently proved against the first appellant, it is unnecessary to consider whether, if the evidence had indicated a design to land the chandu in Johore, the setting out from Singapore for this purpose would not constitute an attempt to facilitate smuggling into Johore contrary to section 108 B (2) of the Penal Code. No argument was addressed to me on this point so I express no opinion upon it.

I allow the appeal of the second appellant Aw Tong and set aside his conviction.

I dismiss the appeal of the first appellant and must say that had the sentence been one of three years instead of eleven months I would not have reduced it.

The sampan presumably has been seized but there has been no order of forfeiture under section 33.

Apparently the Revenue Authorities have doubts as to whether an act done with a sampan in Singapore preparatory to importing chandu is an offence to which section 33 applies, and as the point was not raised on the appeal I leave it open.

Appeal of 1st appellant dismissed.
Appeal of 2nd appellant allowed.

[ORIGINAL CIVIL SUBDIVISION]

WORLEY, J.

IN THE MATTER OF THE ARBITRATION ORDINANCE (CHAPTER 12)

and

IN THE MATTER OF AN ARBITRATION BETWEEN TAN CHU ING AND OTHERS.

(SINGAPORE ORIGINATING MOTION No. 17 of 1928)

Rules of the Supreme Court, Order 61 Rule 6—of the expression "monthly sittings."

By Order 61 Rule 6 of the Rules of the Supreme Court it is provided that an application to set aside an award may be made at any time before the last day of the monthly sittings next after such award has been made and published to the parties. In this case an award was made and published to the parties on the 29th October 1938 and on the 30th November 1938 an application was made by way of Originating Motion to set aside the award. The Motion was served on the respondents on the same day. By Section 43 (1) (a) of the Courts Ordinance it is provided that sittings for the trial of actions shall be held monthly throughout the year commencing on the first Tuesday in each month.

Held, that such monthly sittings continue until the first Tuesday in the next month even though this often means that e.g. the January monthly sittings carry on into the month of February and that there is no interregnum between such monthly sittings.

ADJOURNED SUMMONS.

Laycock for all the Applicants.
Koek for two Respondents.
Coltart for two Respondents.